IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2007-0124
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
HUBERT U. McCAULEY,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-18165

Honorable Carmine Cornelio, Judge

APPEAL DISMISSED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Eric J. Olsson — Tucson
Attorneys for Appellee

Hurbert-Uriel McCauley — Yuma
In Propria Persona

P E L A N D E R, Chief Judge.

¶1 Hubert-Uriel McCauley pled guilty to attempted first-degree murder and burglary in 1986. Pima County Superior Court Judge Thomas Meehan, now deceased,

sentenced him to thirty-six years in prison. Twenty-one years later, in 2007, McCauley filed a pro se motion to vacate judgment, citing Rule 60(c), Ariz. R. Civ. P., as authority. He claimed the judgment of conviction and sentence were void "ab initio" because Judge Meehan did not file an oath of office with the Secretary of State "before entering upon his office." The trial court denied the motion. This appeal followed. Based on several procedural flaws in this proceeding, we dismiss the appeal.

¶2 Preliminarily, we address the state's argument that we must dismiss the appeal because the trial court lacked jurisdiction to rule on the merits of McCauley's untimely motion to vacate judgment. To the extent we can infer from the trial court's denial of McCauley's motion that the court ruled on the merits of the motion, and, therefore, that the court concluded it had subject matter jurisdiction, we review that determination de novo. *See Thomas v. Thomas*, 203 Ariz. 34, ¶ 7, 49 P.3d 306, 307-08 (App. 2002) ("We review de novo the trial court's legal determination that subject matter jurisdiction exists."); *cf. Peterson v. Jacobson*, 2 Ariz. App. 593, 595, 411 P.2d 31, 33 (1966) (a court's jurisdiction "must be invoked or acquired in the mode prescribed by law").

¶3 As we previously noted, McCauley based his motion on Rule 60(c)(4), Ariz. R. Civ. P., which provides relief from a void judgment. Several decades ago, Rule 60(c) applied to both civil and criminal cases. *See State v. Lerch*, 107 Ariz. 529, 531-32, 490 P.2d 1, 3-4 (1971). In 1973, however, our supreme court promulgated the Arizona Rules of Criminal Procedure, including Rule 24.2, Ariz. R. Crim. P., which governs motions to

vacate judgment in criminal cases. *See* 16A A.R.S. p. 3 (1998); *see also State v. Arnold*, 25 Ariz. App. 199, 200, 542 P.2d 37, 38 (1975). In its comment to that rule, our supreme court stated that Rule 24.2 replaced civil "Rule 60(c) with specifically criminal post-trial remedies of similarly broad scope," and that Rule 60(c) "does not have any further application to criminal cases." Ariz. R. Crim. P. 24.2, cmt. Therefore, Rule 24.2, Ariz. R. Crim. P., not Rule 60(c), Ariz. R. Civ. P., applied to and governed McCauley's motion.

¶4 McCauley claimed below that Judge Meehan "did not take the Oath of Office" required by the Arizona Constitution and statutes and, therefore, "was not a lawful judge" when he presided over this case. *See* Ariz. Const. art. VI, § 26; A.R.S. §§ 38-231, 38-232. That omission, McCauley argued, deprived the superior court of subject matter and personal jurisdiction, rendering the judgment of conviction against him void. Pursuant to Rule 24.2(a)(1) and (3), a court in a criminal case may vacate a judgment that was entered "without jurisdiction of the action" or "obtained in violation of the United States or Arizona Constitutions." McCauley's claims fall within those provisions.

¶5 A motion to vacate judgment, however, must be "made no later than 60 days after the entry of judgment and sentence." Ariz. R. Crim. P. 24.2(a). McCauley obviously filed his motion long after that sixty-day time limit had expired. Citing *State v. Hickle*, 129 Ariz. 330, 631 P.2d 112 (1981), the state argues, "the trial court had no jurisdiction over [the] merits" of McCauley's "grossly untimely" claim. We agree.

¶6 In *Hickle*, our supreme court ruled that "the trial court had no jurisdiction to grant a new trial based upon Rule 24.1," Ariz. R. Crim. P., when the defendant's second motion under that rule "was not timely." 129 Ariz. at 332, 631 P.2d at 114. Rule 24.1(b) provides that "[a] motion for a new trial shall be made no later than 10 days after the verdict has been rendered." The court in *Hickle* noted that "the time limits for filing a motion for new trial [are] jurisdictional." *Id*. Because the motion for new trial in that case was untimely, the court ruled that neither the motion nor any of the grounds raised therein "could . . . be considered by the trial court because the trial court did not have jurisdiction to hear the motion." *Id*.

¶7 Similarly, the sixty-day time limit for filing a motion to vacate judgment under Rule 24.2 is mandatory. *See* Ariz. R. Crim. P. 24.2(a), cmt. ("The motion to vacate judgment can be made at any time after entry of judgment and sentence until 60 days have elapsed or the defendant's appeal has been perfected, whichever is sooner."). As our supreme court stated in its comment to the rule, "Rule 24.2 sets the time limit of 60 days for such motions; after that, the defendant may only petition for relief under Rule 32," Ariz. R. Crim. P. Ariz. R. Crim. P. 24.2(a), cmt. Just as the trial court in *Hickle* lacked "jurisdiction to hear the [Rule 24.1] motion," so too did the trial court in this proceeding lack jurisdiction to rule on McCauley's untimely motion to vacate judgment. 129 Ariz. at 332, 631 P.2d at 114.

¶8 As noted above, our supreme court left defendants with the option of seeking post-conviction relief under Rule 32 when the sixty-day time limit under Rule 24.2 for moving to vacate judgment has expired. *See* Ariz. R. Crim. P. 24.2, cmt. But even if McCauley's motion were deemed a Rule 32 petition for post-conviction relief, the trial court did not abuse its discretion when it denied relief.

¶9 Rule 32.1, Ariz. R. Crim. P., provides to "[a]ny person who pled guilty . . . the right to file a post-conviction relief proceeding." For a pleading defendant such as McCauley, post-conviction relief is the functional equivalent of a direct appeal. *State v. Ward*, 211 Ariz. 158, ¶ 9, 118 P.3d 1122, 1126-27 (App. 2005); *see also Summers v. Schriro*, 481 F.3d 710, 711 (9th Cir. 2007). Two possible grounds for post-conviction relief include a conviction or sentence entered in violation of the Arizona or United States Constitution and lack of "jurisdiction to render judgment." Ariz. R. Crim. P. 32.1(a), (b).

¶10 In pertinent part, Rule 32.4(a) permits a defendant to file a petition for post-conviction relief if the defendant has filed a notice of post-conviction relief "within ninety days after the entry of judgment and sentence." *See also State v. Viramontes*, 211 Ariz. 115, ¶ 4, 118 P.3d 630, 631 (App. 2005). This time limit does not apply "'to a defendant sentenced prior to September 30, 1992, who is filing his first petition for post-conviction relief.'" *Moreno v. Gonzalez*, 192 Ariz. 131, ¶ 22, 962 P.2d 205, 209 (1998), *quoting* 171 Ariz. XLIV (1992). But, even if we were to treat McCauley's motion to vacate judgment as a Rule 32 petition, it is not his first Rule 32 petition. He filed a notice and a petition for

post-conviction relief in 1995, contesting his consecutive sentences; the trial court denied relief as did we on review. *See State v. McCauley*, No. 2 CA-CR 1995-0301-PR (memorandum decision filed Feb. 15, 1996). Therefore, the time limits apply to this proceeding.

¶11 Not only was this proceeding untimely commenced, McCauley's claims are precluded. Rule 32.5 requires a defendant to "include every ground known to him or her for vacating . . . all judgments or sentences." With certain exceptions that are neither urged nor applicable here, Rule 32.2(a)(3) precludes a defendant from raising claims "[t]hat ha[ve] been waived at trial, on appeal, or in any previous collateral proceeding." The rule "requires a defendant to raise all known claims for relief in a single petition to the trial court, thereby avoiding piecemeal litigation and fostering judicial efficiency." *State v. Rosales*, 205 Ariz. 86, ¶ 12, 66 P.3d 1263, 1267 (App. 2003); *see also State v. Swoopes*, ___ Ariz. ___, ¶ 24, 166 P.3d 945, ___ (App. 2007). McCauley did not include in his first petition any claim about Judge Meehan's alleged failure to file an oath of office and its effect on the conviction and sentence in this case. The facts underlying his motion were available at and before that time. Therefore, McCauley's claim is precluded even if his motion had been styled or treated as a Rule 32 petition.

¶12 Finally, even if the trial court properly addressed and disposed of McCauley's motion on the merits, we find no error in its ruling. The expanded record contains a copy of Judge Meehan's oath of office filed in 1978 and signed by him and the then Secretary of

State. *See* Ariz. Const. art. VI, § 26 (judges' oaths are filed in Secretary of State's office). An appellate court "may take judicial notice of the records of the secretary of state," and we do so here. *Hernandez v. Frohmiller*, 68 Ariz. 242, 258, 204 P.2d 854, 865 (1949); *see also Brown v. Superior Court*, 81 Ariz. 236, 239, 303 P.2d 990, 991 (1956) (taking judicial notice of "official records as to election matters on file in the office of the secretary of state.").

¶13 At a minimum, the 1978 oath of office authorized Judge Meehan to validly serve and act as a judge during that term of office. Even assuming Arizona law requires a continuously sitting judge to execute and file a new oath each time he or she is elected or appointed to a new term of office, as McCauley first suggests in his reply brief,[1] failure to do so is not a basis for overturning the judge's rulings issued in a case in which the judge's authority to act is not challenged before the decision. *See Rogers v. Frohmiller*, 59 Ariz. 513, 520-21, 130 P.2d 271, 274-75 (1942) (adopting "de facto officer" doctrine in determining validity of acts of public officers whose appointment or election to office legally defective); *In re Estate of de Escandon*, 215 Ariz. 247, ¶ 16, 159 P.3d 557, 562 (App. 2007) (when judge pro tempore "met the minimum constitutional requirements to serve as a superior court judge" and "had de facto authority to serve" as such, litigant "waived any claim that [judge] lacked authority to preside over contested probate matters by not

[1]Generally, "an issue raised for the first time in a reply brief is waived." *State v. Ruggiero*, 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005).

objecting before the hearing commenced"). McCauley cites no authority supporting his belated proposition that a judge's failure to refile an oath of office after retention, reelection, or reappointment divests the court of jurisdiction or renders any subsequent judgments void. Therefore, we find no merit to McCauley's claim.

¶14 For the reasons stated above, this appeal is dismissed.

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JOHN PELANDER, Chief Judge

CONCURRING:

_____
JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge